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**SPEECH BEFORE
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"A TALE OF TWO CENTRIST COUNTRIES: TAFT-HARTLEY, THE THATCHER REFORMS, 1997 AND ALL THAT"

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This is my very first visit to The Royal Institute of International Affairs since becoming Chairman of our U.S. National Labor Relations Board in March, 1994. But, this is the fifth time that I have had the chance to speak to The Institute and, as always, it is a pleasure to be here. I think that it is Boswell's maxim that a man who is tired of London is tired of life and there is no city outside of the United States with which I have had more contact over the years than this one.

This all goes back to 1962-1963 when I was a graduate student at the London School of Economics rushing over to the House of Commons to hear live what Norman Shrapnel of the *Guardian* was reporting about when Harold Wilson squared off first with Harold Macmillan and later Alec Douglas Home, to see Hugh Gaitskell in the bracing October wind of Brighton at the Labor Party Conference there, and to meet with members of Parliament in all of the major political parties of that time -- and, yes, to watch the fabulous *That Was The Week That Was* political satire every Saturday night on British television. My principal reason to be in London then was to get my baptism in comparative labor law with Professor Otto Kahn Freund of the LSE and when I compare the scene then with what it is in 1997, I can't help but note the profound change in the industrial relations and labor law landscapes on both sides of the Atlantic.

In the UK, the unions, of course, had a much greater influence than that ever possessed by their trade union counterparts in the United States. George Woodcock, the General Secretary of the Trades Union Congress, with whom I met shortly after my arrival in the Chalk Farm section of London in the fall of '62, was, along with his organization, a formidable force in not only the Labor Party which the unions had shaped, but in Conservative Governments as well. I don't believe that Mr. Woodcock was entirely uncomfortable with the unflappable Prime Minister Macmillan, though he stressed to me that he could never say anything of the sort in public.

In the collective bargaining arena, although there was a union presence and strength, the story was more complicated. Here, by virtue of multi-union fragmentation and a crazy quilt trade union structure which had grown like Topsy, along with a low dues structure, which was a result of union competition for the same workers, power drifted in key industries, like automobile, into the hands of shop stewards. Through their autonomous negotiating committees, these stewards undertook action including stoppages and the threat of them without any reference to the national unions with which they were affiliated and sometimes without adherence to union constitutions and procedures. Conflict resolution was frequently undertaken as the result of guerrilla warfare, stoppages, slowdowns, or "working to rule" which frequently emerged as a form of intermittent economic pressure.

The trade union view was that the law should stay out of all of this -- both from the perspective of protecting unions as well as regulating them, in part, because of the unfortunate experience with the judiciary which they shared with their American cousins. But, more important, the view was that the *status quo* suited the unions just fine --

notwithstanding the Cassandra-like warning provided by many foreigners about the need to be competitive. Britain had not found her new role in the world, said Dean Acheson. But that was then the world of "I'm all right Jack."

Similarly, young American labor lawyers like myself thought that we had a system which worked just fine in the United States. I touted my experience and the experience of workers and employers with the National Labor Relations Act and the agency that I would come to head 30 years later, the National Labor Relations Board. I thought that it was a system which resolved disputes relating to union representation and unfair labor practices applicable to both unions and employers in a rationale and sensible way. I proclaimed to all of my British friends who would listen -- and listen politely they did, although they didn't think that my points had much applicability to Britain -- that NLRB secret ballot box elections would provide for a more sensible form of union representation involving exclusive bargaining agents and appropriate units and that this, even more than our Taft-Hartley jurisdictional dispute prohibitions, would diminish the jurisdictional warfare which was so prevalent in Britain.

And, in fact, the American system, albeit with enormous deficiencies, endured. What is particularly remarkable about this lengthy legacy is that the labor relations framework of law in the United States has outlasted that of all the modern industrialized countries including Great Britain, Germany and France, as well as Australia and New Zealand. Only the Scandinavian countries have established a procedure and substantive system with a longer history than ours.

The assumption in Britain though was that law in industrial relations which compelled an employer to recognize a union which possessed majority support simply was not then suited to British soil. Even our arbitration system, which I discussed with so many here, was deemed to have little relevance. I shall always remember my good friend John Cole, at that time the labor correspondent for *The Manchester Guardian*, duly noting that the word "arbitration" is derived from the word "arbitrary" and surely that did not provide for more effective dispute resolution procedure than the existing system in Britain.

The '70s brought change to these patterns in both countries. When Edward Heath was elected Prime Minister in an upset victory in 1970, true to the promise of the Conservative Party, comprehensive labor law reform imposing restraints upon unions was enacted in the form of the Industrial Relations Act of 1971. There followed three years of confrontation in which the Heath government ultimately was toppled by virtue of a miners' dispute unrelated to the Industrial Relations Act itself. But this precedent set the stage, along with what was viewed as increasingly irresponsible behavior on the part of the unions during the "winter of discontent" of 1979, for a series of Thatcher labor law reforms which fashioned limits on union power far more wide-sweeping than those legislated in the United States through Taft-Hartley, Landrum-Griffin, or antitrust law. Even prior to the '80s and the early '90s, in which the Thatcher reforms were realized -- this time without the governmental trappings that the Industrial Relations Act provided in the form of an

Industrial Relations Court -- the unions had conceded the logic of the Conservative position in the second Wilson government by accepting legislation in 1975 that was designed to assist them but not restrain union action.

Meanwhile, in the United States, the National Labor Relations Act, which I had thought of as a model in my London student days, began to unravel. In the '70s, employers resisting trade union organization, found loopholes in the Act which permitted them to delay administrative procedures and defeat union organizational efforts with greater ease unrelated to the merits of a union case. The cost of unlawful conduct was suddenly found to be cheap. The absence of an expeditious process made the unavailability of wide-sweeping remedies -- the traditional NLRB orders simply provide for reinstatement, backpay or an order to bargain in good faith -- appeared all the more ineffective.

Labor law reform to cure these obvious deficiencies failed because of the Senate's filibuster which made it impossible to get a vote in that chamber.[1] In the '80s, while the Thatcher reforms were being instituted in Britain, during the Reagan-Bush era a decision was made not to repeal the legislation -- though those administrations viewed the National Labor Relations Act itself with little enthusiasm -- but rather to emasculate the statute with appointments to the Board by some Members who were unsympathetic to its basic goals. This produced the best of all worlds for conservatives who opposed legal intervention in the employment relationship and those employers (it should always be remembered that many employers then and today are law abiding in their conduct) which sought to resist union representation at whatever the cost. The issue could be fought out on terrain during those 12 years which was inhospitable to the Act's objectives. While other factors surely were at work in the decline of trade unions in the U.S., the Act, as interpreted and administered in the '80s and early '90s, most certainly was a factor.

In both countries, trade union representation declined precipitously as did industrial stoppages. Here, in particular, the role of law in the United States was an important consideration because employers could permanently replace economic strikers under a 1938 Supreme Court ruling[2] which had not been used by employers in well-established and mature relationships until the '80s. Arbitration in the U.S. ran into difficulty in connection with its application to new areas of dispute like employment discrimination and to the employment relationship in 90 percent of the workforce where unions were not present.[3]

Now in 1997 we are at one of those rare moments where similar changes in the political landscape allow each country, the United States and Great Britain, to step back and re-examine not only what has happened in their own countries but across the Atlantic. The re-election of President Clinton in 1996 -- providing four more years of the first

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1 *Cf.* William B. Gould IV, *Prospects for Labor Law Reform*, THE NATION, (Apr. 16, 1977).

2 *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

3 This is an issue that is often referred to these days as alternative dispute resolution.

Democratic administration in 12 years -- and the election last month of Prime Minister Tony Blair with the first Labor Government in 18 years -- have changed the political landscape as it relates to industrial relations and other issues in both countries.

Both the Democratic Party in the United States and the Labor Party in Great Britain, under the leadership of Clinton and Blair, have moved to the center. The American transformation began in 1952 when Governor Adlai Stevenson became the first Democratic Party nominee to refuse to pledge the repeal of the 1947 Taft-Hartley amendments which imposed restrictions upon organized labor. Today, Taft-Hartley's golden anniversary exists alongside of progressive administrations in the U.S. and UK, which are committed to a form of managed capitalism and a balanced approach to the competing interests of freedom of association and solidarity for workers, on the one hand, and, on the other hand, the need for American and British employers to be competitive in the global marketplace. In an interdependent democratic society these goals are not incompatible -- a truth long accepted in a good number of mature collective bargaining relationships.

In my country, the appointments made to our National Labor Relations Board during these past three years have been, for the most part, individuals who are committed to the objectives of our legislation, i.e., with the promotion of the practice and procedure of collective bargaining and freedom of association amongst workers. In Britain, Prime Minister Blair has pledged to leave intact the labor law reforms of the past 20 years under both Labor and Conservative governments and to provide a framework through which unions which represent the majority of the employees may obtain compulsory recognition -- a framework which exists in imperfect form in the U.S.

Suddenly, in the '90s, there is commitment to the idea of rights and obligations for both labor and management on both sides of the Atlantic. My sense is that this stems from a belief in both the United States and Great Britain that democracy in the workplace means that government must focus upon the interests of workers as well as employers and a commitment to the resolution of differences through the parties' own autonomous structures.

There are, of course, issues aplenty for our National Labor Relations Board in the United States and for whatever mechanism is established here in Britain in the Blair Administration in the future. How does one establish expeditious administrative procedures which, within the parameters of Supreme Court authority, fashion opportunities for employees to hear both the merits and demerits of the case for unionization? After three decades of Board decisions which established the right of unions to have the names of addresses of employees so that they can communicate with them and send them literature and recruit them, the Board still is trying to apply the principles established so that both sides have an equal opportunity to communicate.

In your country, the Labor Government in the '60s were of the view that postal ballots for unions were particularly important, given the potential for coercion in the union hall itself, particularly, with a "show of hands" procedure. This policy was enacted into law as part of the Thatcher reforms of the '80s. Now, in the United States, our Board has used postal ballots in representation disputes where workers have the opportunity to vote for or against a union to represent them, in a greater number of instances than was the case prior to the time that we came to office. (Our friends over at the National Mediation Board who administer the Railway Labor Act, which applies to railways and airlines, use postal ballots in practically every instance -- and haven't used a manual ballot at an employer's facility since 1987!)

The challenge which prompts more focus upon postal ballots is that workers are not always likely to have ready access to the ballot box at the workplace -- particularly when they are part-time or in a "call in" or staggered shift status. How do we insure both fairness and the opportunity for all who wish to possess the franchise to vote? Both countries must attempt to address these problems.

Both the United States and the United Kingdom are confronted with a global marketplace which has increased competitive pressures for employers. The British Government's commitment to sign the European Union Social Chapter will establish a mechanism which parallels in some limited respects the duty to bargain which exists under our statute. The practical problems that arise in both countries will emerge from the need for corporations to reorganize themselves and for unions and representatives of workers to protect the job security of those whom they represent and enhance their employment prospects generally.

In both countries, the attempt is and will be made to promote procedures through which employees and trade unions can be involved and, at the same time, employers can function competitively. Both countries must attempt to address the problems of contingent or atypical workers, as they are called here and across Europe, insofar as the ability to participate in the shaping of their employment relationship is concerned. The need for employees to participate in the enterprise, through both collective bargaining procedures as well as other mechanisms will be part of the discussion. In my country this debate has taken place in the context of a discussion of whether the so-called TEAM Act should be passed by Congress.

Through both administrative initiatives as well as statutory interpretation, my agency, which undertakes such responsibilities independent of immediate supervision by the Executive Branch, (or any other governmental entity except the Supreme Court's mandates interpreting the National Labor Relations Act) will attempt to continue the sometimes daunting task of providing for workplace democracy. I look forward to a dialogue as your government, committed as is mine, to finding the center or impartial ground between labor and management, undertakes a task which in some broad respects is similar.

This is the role that I have assumed as an impartial arbiter between labor and management in the three decades since I left the LSE. This is my role as Chairman of the National Labor Relations Board.

Now that our two countries find themselves on a centrist course, where will it lead next? My belief is that we are at a turning point in industrial relations where a fundamental shift is taking place -- a shift from the presumption underlying the traditional labor relations framework of a natural conflict between labor and management, to more cooperation. While traditionally, cooperation was viewed as inconsistent with genuine robust representation by autonomous unions or employee groups, the fact of the matter is that a better understanding of employer sales and product problems can enhance both the system of representation and the viability of the enterprise.

This shift arises from a recognition of two important factors, among others, by labor and management. First, is a realization that to successfully compete in the new global marketplace, American companies, unions, and employees have it in their self interest to cooperate with each other. The same principle holds true on British soil, and in non-union settings. The parties are beginning to wake up to a recognition that the survival of their industries is at stake.

A second growing recognition, and this is more on the part of management, is that a company's employees are its greatest asset. Instead of asking workers to check their brain in at the factory or establishment gate, enlightened management views them as a wellspring of ideas on improving operations and production.

Evidence of these two factors in the U.S. is seen in the proliferation of quality of worklife (QWL), employee participation and team programs. Notwithstanding the economic success in my country, regarded as the great jobs machine, smart managers recognized the deficiencies in our old industrial relations model and borrowed heavily from successful practices in Japan, Germany, and other countries, that promote labor-management cooperation.

In my own work at the Board, and previously in my scholarly writings, I have attempted to advance more constructive, cooperative, harmonious labor-management relations to reach the middle ground – or "vital center," has President Clinton has described it. Two recent Board decisions in which I wrote concurring opinions illustrate this point.

In *Keeler Brass Automotive Group,*[4] the Board found the employer had violated the Act by dominating an employee participation committee and interfering with its administration. In that case, I spoke approvingly of decisions which are:

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[4] 318 NLRB 1110, 1117 (1995).

> [C]onsistent with the movement toward cooperation and democracy in the workplace which I have long supported. This movement is a major advance in labor relations because, in its best form, it attempts nothing less than to transform the relationship between employer and employees from one of adversaries locked in unalterable opposition to one of partners with different but mutual interests who can cooperate with one another. Such a transformation is necessary for the achievement of true democracy in the workplace. However, it does pose a potential conflict with the National Labor Relations Act, enacted in 1935 at a time when the adversarial struggle between management and labor was at its height.

In the other case, *Q-1 Motor Express, Inc.*,[5] the Board found the company's failure to bargain over its decision to relocate a terminal was unlawful. I said in my concurring opinion:

> In my view, the Act requires decision bargaining where the reasons underlying the relocation of unit work are amenable to bargaining and not solely to those decisions which implicate labor costs. And the issue is particularly vital and central to the new global marketplace of competitive pressure which affects both employers and unions as well as the public interest.

As I have stated on previous occasions, the genius of the Act is that it provides a legal framework for industrial relations designed to keep government out of the workplace, leaving most problems to resolution by the parties who are best equipped to solve them using the kinds of creative means preferred by those most directly affected. This has been the overriding theme of my opinions in both *Keeler Brass* and *Q-1 Motor Express, Inc.* In both situations accepting the ideas advanced would diminish wasteful litigation as well as foster communication and greater understanding for employers and employers. And since March 1994, our decisions have attempted to reflect a balance and consideration for the competing interests of labor, management, and individuals, as well as a commitment to the practice and procedure of collective bargaining and the promotion of voluntarily negotiated procedures by the parties.

This is then the sensible, centrist course upon which I see our countries embarking in the years ahead as the industrial relations field braces for the 21st century.

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[5] 323 NLRB No. 142 at slip op. p. 4 (May 23, 1997).